

CARNEY BATES & PULLIAM, PLLC

Hank Bates (Ca. # 167688)
11311 Arcade Drive, Suite 200
Little Rock, Arkansas 72212
Tel: 501-312-8500

GOLOMB & HONIK, PC

Richard M. Golomb
Ruben Honik
Kenneth J. Grunfeld
1515 Market Street, Suite 1100
Philadelphia, Pennsylvania 19102
Tel: 215-985-9177

KU & MUSSMAN, PA

Brian T. Ku
M. Ryan Casey
12550 Biscayne Boulevard, Suite 406
Miami, Florida 33181
Tel: 305-891-1322

Attorneys for Plaintiffs Tasha Smith
and Fredierick Smith and the
Proposed Class

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

TASHA SMITH and FREDIERICK
SMITH, individually and on behalf of
all others similarly situated

Plaintiffs,

vs.

INTUIT, INC., a Delaware corp.,

Defendant.

CASE NO.: 5:12-cv-00222-EJD

**PLAINTIFFS' NOTICE OF
UNOPPOSED CORRECTED
MOTION AND PLAINTIFFS'
UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT THEREOF**

Judge: Hon. Edward J. Davila
Place: Courtroom 4, 5th Floor
Date: May 24, 2013
Time: 9:00 a.m.

1 **TO THIS COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 Please take notice that on the date, at the time, and in the above-indicated
3 department of the above-entitled Court, Plaintiffs Tasha Smith and Fredierick
4 Smith, by and through their counsel, and pursuant to the Settlement Agreement
5 dated May 9, 2013 (the “Agreement”) and the exhibits attached thereto, will hereby
6 move this Court for preliminary approval of the proposed settlement (the
7 “Settlement”) of this case. In particular, Plaintiffs will respectfully request this
8 Court to enter an order (i) granting preliminary approval of the proposed
9 Settlement; (ii) conditionally certifying the proposed settlement class (the “Class”);
10 (iii) directing that notice of the proposed Settlement be given to members of the
11 Class in the proposed form and manner; and (iv) scheduling a final approval
12 hearing before the Court to determine whether the proposed Settlement should be
13 finally approved.

14 This Corrected Motion is unopposed by Defendant. The only difference
15 between this Corrected Motion and the original motion, filed April 13, 2013, is the
16 effective date of the Settlement Agreement. There is no substantive change to the
17 Settlement Agreement or the pleadings in support of the motion seeking
18 preliminary approval of the class action settlement. Notwithstanding the
19 uncontested nature of this Motion, Plaintiffs have set the Motion for a hearing date
20 in accordance with the Local Rules. However, the parties believe that this Motion
22 can be decided without a hearing and request that this Motion be decided without a
23 hearing on the papers submitted contemporaneously herewith.¹

24 Dated: May 10, 2013

Respectfully Submitted,
MILSTEIN ADELMAN, LLP

26 ¹The Agreement and the exhibits attached thereto and a Memorandum of
27 Points and Authorities in Support of Unopposed Motion for Preliminary Approval
28 of Class Action Settlement are being contemporaneously filed herewith.

1 By: /s/ Gillian Wade
2 Gillian Wade (Ca. # 229124)
3 gwade@milsteinadelman.com
4 Isaac Miller (Ca. # 266459)
5 imiller@milsteinadelman.com
6 2800 Donald Douglas Loop North
7 Santa Monica, California 90405
8 Tel: 310-396-9600

9 *and*

10 **CARNEY BATES & PULLIAM,**
11 **PLLC**

12 Hank Bates (Ca. # 167688)
13 hbates@cbplaw.com
14 11311 Arcade Drive, Suite 200
15 Little Rock, Arkansas 72212
16 Tel: 501-312-8500

17 *and*

18 **GOLOMB & HONIK, PC**

19 Richard M. Golomb
20 rgolomb@golombhonik.com
21 Ruben Honik
22 rhonik@golombhonik.com
23 Kenneth J. Grunfeld
24 kgrunfeld@golombhonik.com
25 1515 Market Street, Suite 1100
26 Philadelphia, Pennsylvania 19102
27 Tel: 215-985-9177

28 *and*

KU & MUSSMAN, PA

Brian T. Ku
brian@kumusman.com
M. Ryan Casey
ryan@kumusman.com
12550 Biscayne Boulevard, Suite 406
Miami, Florida 33181
Tel: 305-891-1322

*Attorneys for Plaintiffs Fredierick
and Tasha Smith and the Class*

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	OVERVIEW OF THE LITIGATION.....	1
III.	THE PROPOSED SETTLEMENT AND SETTLEMENT PROCEDURE	3
A.	Settlement Terms	3
B.	Proposed Class Definition.....	4
C.	Proposed Class Action Settlement Procedure.....	5
IV.	ARGUMENT	6
A.	Applicable Legal Standards	6
B.	The Proposed Settlement Warrants Preliminary Approval	8
1.	The Settlement Falls Within the Range of Possible Approval	8
2.	There is No Reason to Doubt the Fairness of the Settlement	10
C.	Conditional Certification of the Class is Appropriate	11
1.	The Class is Sufficiently Numerous	12
2.	Common Questions of Law or Fact Exist	13
3.	Class Representatives' Claims are Typical of Those of the Class	14
4.	Class Representatives Will Adequately Protect the Interests of the Class	15
5.	The Requirements of Rule 23(b) Are Satisfied	16

1	<i>a. Common Questions of Law or Fact Predominate.....</i>	16
2	<i>b. A Class Action Is the Superior Method of</i>	
3	<i>Adjudicating This Case</i>	17
4	D. The Proposed Notice Program Is Adequate.....	18
5	V. CONCLUSION	19

TABLE OF AUTHORITIES

Cases

Page(s)

<i>Amchem Prods. v. Windsor</i> , 521 U.S. 591 (1997)	15. 16, 17
<i>Berlowitz ex rel. Berlowitz v. Nob Hill Masonic Mgmt.</i> , No. C-96-01241 MHP, 1996 U.S. Dist. LEXIS 22599 (N.D. Cal. 1996).....	12
<i>City of Detroit v. Grinnell Corp.</i> , 495 F.2d 448 (2d Cir. 1974)	9
<i>DeBoer v. Mellon Mortgage. Co.</i> , 64 F.3d 1171 (8th Cir. 1995)	14
<i>Evans v. Am. Credit Sys.</i> , 222 F.R.D. 388 (D. Neb. 2004)	17
<i>Franklin v. Kaypro Corp.</i> , 884 F.2d 1222 (9th Cir. 1989)	8
<i>Hassine v. Jeffes</i> , 846 F.2d 169 (3d Cir. 1988)	15
<i>In re Am. Med. Sys.</i> , 75 F.3d 1069 (6th Cir. 1996)	14
<i>In re Apple Computer Sec. Litig.</i> , No. C-84-20148-(A)-JW, 1991 WL 238298 (N.D. Cal. Sept. 6, 1991).....	10
<i>In re Cendant Corp. Litig.</i> , 264 F.3d 201 (3d Cir. 2001)	15
<i>In re Med. Ex-Ray Film Antitrust Litig.</i> , CV-93-5904, 1998 U.S. Dist. LEXIS 14888 (E.D.N.Y. Aug. 7, 1998).....	9
<i>In re Michael Milken & Assocs. Sec. Litig.</i> , 150 F.R.D. 46 (S.D.N.Y. 1993).....	10

1	<i>In re NASDAQ Market-Makers Antitrust Litig.,</i>	
2	176 F.R.D. 99 (S.D.N.Y. 1997).....	8
3	<i>In re Potash Antitrust Litig.,</i>	
4	159 F.R.D. 682 (D. Minn. 1995)	17
5	<i>In re Prudential Sec. Inc. Ltd. P'ships Litig.,</i>	
6	163 F.R.D. 200 (S.D.N.Y. 1995).....	7
7	<i>In re M.L. Stern Overtime Litig.,</i>	
8	Case No. 07-CV-0118-BTM (JMA), 2009 U.S. Dist. LEXIS 31650	
9	(S.D. Cal. April 13, 2009)	7
10	<i>In re Traffic Executive Ass'n-E. R.R.s,</i>	
11	627 F.2d 631 (2d Cir. 1980)	8
12	<i>In re Warfarin Sodium Antitrust Litig.,</i>	
13	391 F.3d 516 (3d Cir. 2004)	14
14	<i>In re Warner Comm. Sec. Litig.,</i>	
15	618 F. Supp. 735 (S.D.N.Y. 1985),	
16	<i>aff'd</i> , 798 F.2d 35 (2d Cir. 1986)	10
17	<i>Jerry Enters. v. Allied Bev. Group, L.L.C.,</i>	
18	178 F.R.D. 437 (D.N.J. 1998)	14
19	<i>McAnaney v. Astoria Fin. Corp.,</i>	
20	No. 04-CV-1101, 2006 WL 2689621 (E.D.N.Y. Sept. 19, 2006).....	14
22	<i>Moore v. PaineWebber, Inc.,</i>	
23	306 F.3d 1247 (2d Cir. 2002)	10
24	<i>Newman v. Stein,</i>	
25	464 F.2d 689 (2d Cir. 1972)	14
26	<i>Seidman v. Am. Mobile Sys.,</i>	
27	157 F.R.D. 354 (E.D. Pa. 1994)	16

1	<i>Strougo v. Bassini</i> ,	
2	258 F. Supp. 2d 254 (S.D.N.Y. 2003)	10
3	<i>Van Bronkhorst v. Safeco Corp.</i> ,	
4	529 F.2d 943 (9th Cir. 1976)	8
5	<i>Vandervort v. Balboa Capital Corp.</i> ,	
6	287 F.R.D. 554 (C.D. Cal. 2012)	13
7	<i>Vinh Nguyen v. Radiant Pharmaceuticals Corp.</i> ,	
8	287 F.R.D. 563 (C.D. Cal. 2012)	12
9	<i>Weeks v. Kellogg Co.</i> ,	
10	Case No. CV 09-08102 (MMM) (RZx), 2011 U.S. Dist. LEXIS	
11	155472 (C.D. Cal. Nov. 23, 2011)	11
12	<i>West Virginia v. Chas. Pfizer & Co.</i> ,	
13	314 F. Supp. 710 (S.D.N.Y. 1970),	
14	<i>aff'd</i> , 440 F.2d 1079 (2d Cir. 1971)	9, 10
15	<i>Williams v. First Nat'l Bank</i> ,	
16	216 U.S. 582 (1910)	8

Statutes and Constitutional Provisions

18	15 U.S.C. § 1601, <i>et seq.</i>	2
19	Cal. Bus. & Prof. Code § 17200	2, 13, 14, 17
20	Cal. Bus. & Prof. Code § 17500	2, 14, 17
21	Cal. Bus. & Prof. Code § 22250	2
22	Cal. Civ. Code § 1916.1	2
23	Cal. Const. art. XV, § 1	2

Other Authorities

A. Conte & H. B. Newberg, *Newberg on Class Actions* (4th ed. 2002) 5, 6, 7

Manual for Complex Litigation (3d ed. 1975)..... 8

Manual for Complex Litigation (1977) 8

Manual for Complex Litigation Fourth (2004) 7

Rules

Federal Rule of Civil Procedure 23*passim*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2
3 Plaintiffs Tasha Smith and Fredierick Smith (“Plaintiffs”) respectfully
4 submit this memorandum of points and authorities in support of their motion for an
5 order preliminarily approving the proposed settlement (the “Settlement”) reflected
6 in the Settlement Agreement (the “Agreement” or “Settlement Agreement”), which
7 is being contemporaneously filed herewith. *See* Declaration of Hank Bates (“Bates
8 Decl.”), Ex. 1.

9 **I. INTRODUCTION**

10 Plaintiffs have reached a Settlement with Intuit, Inc. (“Intuit” or
11 “Defendant”) in the above-referenced class action (the “Action” or the
12 “Litigation”) and now seek an Order from the Court: (1) granting preliminary
13 approval of the Settlement; (2) conditionally certifying the proposed settlement
14 class (the “Class”), (3) directing that notice of the Settlement be given to the Class
15 in the proposed form and manner, and (4) scheduling a final approval hearing
16 before the Court to determine whether the proposed Settlement should be finally
17 approved. As detailed herein and in the Agreement, the Settlement provides
18 significant and material benefits to the Class and was reached only after rigorous
19 examination of the facts and the law, as well as intensive arm’s length settlement
20 negotiations between experienced and informed counsel on both sides, with the
21 assistance of a highly experienced and respected mediator.

22 **II. OVERVIEW OF THE LITIGATION**

23 On January 13, 2012, the following actions were filed against Intuit:

- 24
25 1. *Smith v. Intuit* (Case No. 5:12-cv-00222), currently pending in
26 the United States District Court for the District of Northern
27 California (the “*Smith* Action”); and
28

1 2. *Quildon v. Intuit* (Case No. 112-cv-216744), currently pending
2 in the Superior Court of California (the “*Quildon Action*”).

3 Each of the cases set forth above (collectively referred to as the “Related
4 Actions”) was predicated on similar allegations, including allegations that Intuit’s
5 conduct and omissions relating to the Refund Processing Service through
6 TurboTax online violates California’s refund anticipation loan statute (Cal. Bus. &
7 Prof. Code § 22250, *et seq.*), usury laws (Cal. Const. art. XV, § 1; Cal. Civ. Code §
8 1916.1, *et seq.*); Unfair Competition Law (Cal. Bus. & Prof. Code § 17200); False
9 Advertising Law (Cal. Bus. & Prof. Code § 17500); and the federal Truth in
10 Lending Act (“*TILA*”) (15 U.S.C. § 1601 *et seq.*).

11 On March 19, 2012, Defendant moved to dismiss the *Smith* Action.
12 Plaintiffs filed a response in opposition to Defendant’s motion on April 13, 2012.
13 Defendant filed a reply brief on April 27, 2012.

14 On September 10, 2012, this Court entered an order in the *Smith* Action
15 granting Defendant’s motion to dismiss, while, at the same time, granting Plaintiffs
16 leave to amend. In accord with the Court’s order, Plaintiffs filed an Amended
17 Class Action Complaint on October 9, 2012, which was superseded by Plaintiffs’
18 Second Amended Class Action Complaint on January 3, 2013.

19 Contemporaneously with the proceedings in the *Smith* Action, Defendant
20 removed the *Quildon* Action to federal court. Plaintiffs, in turn, moved to remand
21 the *Quildon* Action back to the Superior Court of California for Santa Clara
22 County. While Plaintiffs’ motion for remand was still pending in the *Quildon*
23 Action, Defendant filed a motion to dismiss that action with this Court. On April
24 5, 2012, this Court entered an order referring the Related Actions to ADR. Shortly
25 thereafter, Defendant, on the one hand, filed a response in opposition to Plaintiffs’
26 motion to remand, while Plaintiffs, on the other hand, filed a response in opposition
27 to Defendant’s motion to dismiss. Plaintiffs filed a reply brief in further support of
28

1 remand on April 26, 2012. A day later, Defendant filed a reply brief in further
2 support of dismissal. On March 18, 2012, this Court entered an order granting
3 Plaintiffs' motion to remand and denying Defendant's motion to dismiss as moot.¹

4 In accord with the Court's order referring the Related Actions to ADR, the
5 parties participated in mediation before the highly experienced and respected
6 mediator Randall W. Wulff, of Dispute Resolution. With the assistance of this
7 neutral mediator, the parties were ultimately able to negotiate an agreement in
8 principle to settle all claims alleged against Intuit in the Related Actions. Notice of
9 the settlement was given to the Court on January 2, 2013, and this Court set a
10 hearing for consideration of a motion for preliminary approval for May 24, 2013.

11 On May 9, 2013, the Parties executed a comprehensive settlement
12 agreement, which sets forth the terms and conditions of the Settlement and the
13 parties' respective rights and obligations thereunder. *See generally* Settlement
14 Agreement, and the exhibits annexed thereto, being filed contemporaneously
15 herewith.

16 **III. THE PROPOSED SETTLEMENT AND SETTLEMENT**
17 **PROCEDURE**

18 **A. Settlement Terms**

19 In settlement of all claims in the Litigation, the Defendant has agreed to
20 create a \$6,550,000.00 fund to be divided, after deduction of court-awarded
21 attorneys' fees and expenses, and notice and administration costs, among
22 Settlement Class Members with Approved Claims, as defined in the Agreement.
23 *See* Settlement Agreement, ¶ 44. In exchange for the consideration from the
24 Defendant, the Litigation will be dismissed with prejudice upon final approval of
25
26

27 ¹ On August 17, 2012, the Superior Court stayed the *Quildon* Action in its entirety
28 pending the outcome of the *Smith* Action.

1 the Settlement, and Plaintiffs and Class Members shall discharge Defendant of all
2 “Released Claims.” *Id.* at ¶¶ 34, 47-53.

3 **B. Proposed Class Definition**

4 For the purpose of implementing the terms of the Agreement, Plaintiffs,
5 consistent with paragraphs 40 and 41 of the Settlement Agreement, request that this
6 Court certify the following class pursuant to Rule 23(b)(3), as follows:

7 All Intuit customers in the United States who used Intuit’s TurboTax
8 online and utilized the Refund Processing Service from the time
9 period from and including January 12, 2008, through the date of the
10 order granting preliminary approval of the settlement. Excluded from
11 the Class are all persons who elect to exclude themselves from the
12 Class, Intuit, the Court and staff to whom this case is assigned, and
any member of the Court’s or staff’s immediate family.

13 In addition, Plaintiffs request that the Court appoint Tasha Smith, Frediereck
14 Smith and Sache Quildon as Class Representatives. Tasha Smith and Frediereck
15 Smith are the individuals who filed this action. Sache Quildon is the named
16 Plaintiff in the *Quildon* Action, but she is also a signatory to the Settlement
17 Agreement and a class member in the class referenced in the paragraph above. The
18 Parties have agreed that, subject to this Court’s approval, she should be considered
19 a class representative in this case. *See* Settlement Agreement, ¶¶ 30, 72. It is
20 further contemplated under the Settlement Agreement that Ms. Quildon will seek
22 dismissal of the *Quildon* Action. *See id.*, ¶ 72.

23 Pursuant to Rule 23(b)(3) and the Agreement, any individual meeting the
24 definition of Class Member may, through a timely filed Opt-Out request, opt out of
25 the Class and the provisions of the Settlement Agreement, and, in doing so, shall
26 not be held to the terms of the release contained in the Settlement Agreement. *See*
27 Settlement Agreement, ¶¶ 59-60; *see also* Exhibit 1 of the Settlement Agreement
28 (Long Form Notice), p. 7.

1 **C. Proposed Class Action Settlement Procedure**

2 Judicial proceedings under Federal Rule of Civil Procedure 23 have led to a
3 defined procedure and specific criteria for settlement approval in class action
4 settlements. The Rule 23(e) settlement approval procedure describes three distinct
5 steps:

- 6 1. Conditional certification of a settlement class and preliminary
7 approval of the proposed settlement after submission to the
8 Court of a written motion for preliminary approval;
- 9 2. Dissemination of notice of settlement to all affected Class
10 members; and
- 11 3. A formal fairness hearing, or final settlement approval hearing,
12 at which Class members may be heard regarding the settlement,
13 and at which evidence and argument concerning the fairness,
14 adequacy and reasonableness of the settlement is presented.

15 This procedure safeguards class members' procedural due process rights and
16 enables the Court to fulfill its role as the guardian of class interests. *See* 4
17 Newberg on Class Actions § 11.22, *et seq.*

18 With this motion, Plaintiffs request that the Court grant conditional
19 certification of a settlement class, preliminarily approve the proposed Settlement,
20 and approve the form of notice contemplated under the Settlement Agreement.
21 The purpose of the Court's preliminary evaluation of the proposed Settlement
22 Agreement is to determine whether it is within "the range of reasonableness" and
23 thus whether notice to the Class of the terms and conditions of the Settlement
24 Agreement, and the scheduling of a formal fairness or final approval hearing, are
25 worthwhile. 4 Newberg § 11.25.

26
27 The parties further request that the Court conditionally certify the proposed
28 Class at this time, appoint Plaintiffs' counsel as Class Counsel for the Settlement

1 Class, and appoint Tasha Smith, Frediereck Smith and Sache Quildon as adequate
2 Class Representatives. The additional rulings sought on this motion — approving
3 the form, content and distribution of Class Notice, and scheduling a final approval
4 hearing — facilitate the settlement approval process and are also typically made at
5 the preliminary approval stage. 4 Newberg § 11:24 *et seq.*

6 Consistent with the provisions of the Settlement Agreement, the parties
7 propose the following deadlines for the settlement procedure:

- 8 • Preliminary approval hearing: May 24, 2013 (as previously set by the
9 Court);
- 10 • Deadline for Intuit to create Settlement Fund: within 30 days after
11 preliminary approval order;
- 12 • Deadline for Intuit to provide the List of Potential Class Members to
13 the Settlement Administrator: within 30 days after preliminary
14 approval order;
- 15 • Deadline for Notice: 60 days after preliminary approval order;
- 16 • Deadline for Objections: 60 days after notice deadline;
- 17 • Deadline for Motion for final approval and fee application – 35 days
18 before the final approval hearing;
- 19 • Deadline for Objections – 30 days before the final approval hearing;
20 and
- 22 • Deadline for Claims – 30 days after final approval hearing.

23 The parties also propose that the Court schedule the final approval hearing
24 approximately 125 days after the preliminary approval hearing or shortly thereafter
25 consistent with the availability of the Court’s schedule.

26 **IV. ARGUMENT**

27 **A. Applicable Legal Standards**

28

1 Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval
2 of the compromise of claims brought on a class basis. The procedure for judicial
3 approval of a proposed class action settlement is well established:

4 Review of a proposed class action settlement generally involves two
5 hearings. First, counsel submit the proposed terms of settlement and
6 the judge makes a preliminary fairness evaluation . . . If the case is
7 presented for both class certification and settlement approval, the
8 certification hearing and preliminary fairness evaluation can usually
9 be combined. The judge should make a preliminary determination
10 that the proposed class satisfies the criteria set out in Rule 23(a) and at
11 least one of the subsections of Rule 23(b) . . . The judge must make a
12 preliminary determination on the fairness, reasonableness, and
adequacy of the settlement terms and must direct the preparation of
the notice of the certification, proposed settlement, and date of the
final fairness hearing.

13 *In re M.L. Stern Overtime Litig.*, Case No. 07-CV-0118-BTM (JMA), 2009 U.S.
14 Dist. LEXIS 31650, at *8-9 (S.D. Cal. April 13, 2009) (quoting Manual for
15 Complex Litigation Fourth § 21.632 (2004)). Importantly, “[b]ecause class
16 members will subsequently receive notice and have an opportunity to be heard on
17 the settlement, [a] Court need not review the settlement in detail at [the preliminary
18 approval stage]; instead, preliminary approval is appropriate so long as the
19 proposed settlement falls ‘within the range of possible judicial approval.’” *Id.* at
20 *9-10 (quoting A. Conte & H. B. Newberg, *Newberg on Class Actions*, § 11.25 (4th
22 ed. 2002)); *see also In re Prudential Sec. Inc. Ltd. P’ships Litig.*, 163 F.R.D. 200,
23 209 (S.D.N.Y. 1995) (“The Court’s function now is to ascertain whether there is
24 any reason to notify the class members of the proposed settlement and to proceed
25 with a fairness hearing.”) (citation omitted).

26 At this juncture, Plaintiffs request only that the Court grant preliminary
27 approval of the proposed Settlement and provide for notice to the Class. “Where
28

1 the proposed settlement appears to be the product of serious, informed, non-
2 collusive negotiations, has no obvious deficiencies, does not improperly grant
3 preferential treatment to class representatives or segments of the class and falls
4 within the range of possible approval, preliminary approval is granted.” *In re*
5 *NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997).
6 Here, preliminary approval should be granted because the proposed Settlement and
7 the proposed form and program of providing notice satisfy the requirements for
8 preliminary approval in all respects.

9 **B. The Proposed Settlement Warrants Preliminary Approval**

10 As a matter of public policy, settlement is a strongly favored mechanism for
11 resolving disputed claims. *Williams v. First Nat’l Bank*, 216 U.S. 582, 595 (1910).
12 This “overriding public interest in settling and quieting litigation . . . is particularly
13 true in class action suits.” *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1229 (9th Cir.
14 1989) (quoting *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976)).
15 Turning to the specifics of this Action, preliminary approval of the Settlement
16 should be granted because the Settlement is within the range of possible approval
17 and there is no reason to doubt its fairness. To grant preliminary approval and
18 justify providing notice to the Class, the Court need only conclude that the
19 proposed Settlement is “within the range of possible approval” and “does not
20 disclose grounds to doubt its fairness.” *See Manual for Complex Litigation* §30.41,
22 at 237 (3d ed. 1975). Such a finding “is at most a determination that there is what
23 might be termed ‘probable cause’ to submit the proposal to class members and hold
24 a full-scale hearing as to its fairness.” *In re Traffic Executive Ass’n-E. R.R.s*, 627
25 F.2d 631, 634 (2d Cir. 1980) (citing *Manual for Complex Litig.*, § 1.46 at 55 n.10
26 (1977)). Here, there is sufficient “probable cause” to warrant preliminarily
27 approving the proposed Settlement and providing notice to the Class.

28 **1. The Settlement Falls Within the Range of Possible Approval**

1 The value of the proposed Settlement falls well within the range of a
2 reasonable settlement. The determination of a “reasonable” settlement is not
3 susceptible to a mathematical equation yielding a particularized sum. *In re Med.*
4 *Ex-Ray Film Antitrust Litig.*, CV-93-5904, 1998 U.S. Dist. LEXIS 14888, at *15
5 (E.D.N.Y. Aug. 7, 1998); *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972) (“[I]n
6 any case there is a range of reasonableness with respect to a settlement – a range
7 which recognizes the uncertainties of law and fact in any particular case and the
8 concomitant risks and costs necessarily inherent in taking any litigation to
9 completion.”) As such,

10
11 [t]he fact that a proposed settlement may only amount to a fraction of
12 the potential recovery does not, in and of itself, mean that the
13 proposed settlement is grossly inadequate and should be disapproved. .
14 . . In fact there is no reason, at least in theory, why a satisfactory
15 settlement could not amount to a hundredth or even a thousandth part
16 of a single percent of the potential recovery.

17 *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 & n.2 (2d Cir. 1974) (citations
18 omitted).

19 Here, while Plaintiffs have calculated the maximum value of their claims to
20 be a figure larger than the settlement amount, when this amount is discounted by
21 the identifiable risks, experience dictates that the interests of the Class are better
22 served by the proposed Settlement. *See West Virginia v. Chas. Pfizer & Co.*, 314
23 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff’d*, 440 F.2d 1079 (2d Cir. 1971) (“In
24 considering the proposed compromise, it seems also to be of importance that (if
25 approved) the substantial amounts of money are available for class members now,
26 and not at some distant time in the future. The nature of these actions is such that a
27 final judgment, assuming it to be favorable, could only be obtained after years of
28 expensive litigation. It has been held proper to take the bird in hand instead of a

1 prospective flock in the bush.”) (citations omitted); *see also In re Michael Milken*
2 *& Assocs. Sec. Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993) (noting that even a
3 favorable jury verdict “is no guarantee of ultimate success”). More particularly,
4 the outcome of continued litigation and a trial against the Defendant is uncertain.
5 The Defendant has vigorously denied Plaintiffs’ allegations of wrongdoing. As
6 such, multiple legal issues remain to be determined by the court and a jury would
7 have to evaluate a host of conflicting evidence. *See Strougo v. Bassini*, 258 F.
8 Supp. 2d 254, 259-60 (S.D.N.Y. 2003) (citing *In re Warner Comm. Sec. Litig.*, 618
9 F. Supp. 735, 744-45 (S.D.N.Y. 1985), *aff’d*, 798 F.2d 35 (2d Cir. 1986)).

10 Moreover, even if Plaintiffs were to prevail through continued litigation and
11 at trial, they still face significant risks. “It is known from past experience that no
12 matter how confident one may be of the outcome of litigation, such confidence is
13 often misplaced.” *West Va. v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44
14 (S.D.N.Y. 1970), *aff’d*, 440 F.2d 1079 (2d Cir. 1971). For example, in *In re Apple*
15 *Computer Sec. Litig.*, No. C-84-20148-(A)-JW, 1991 WL 238298 (N.D. Cal. Sept.
16 6, 1991), the jury rendered a verdict in favor of plaintiffs and found recoverable
17 damages in excess of \$100 million. Nonetheless, the trial court disagreed and
18 overturned the verdict, entering a judgment notwithstanding the verdict for the
19 individual defendants and ordering a new trial with regard to the corporate
20 defendant. *Id.*

22 Clearly, in light of the foregoing, the benefits conferred by the Settlement are
23 within the range of reasonableness. Thus, preliminary approval of the proposed
24 Settlement should be granted.

25 **2. There is No Reason to Doubt the Fairness of the Settlement**

26 Because the Settlement in this Litigation is the product of extensive arms’
27 length negotiations, there is no reason to doubt its fairness. A proposed settlement
28 that is the result of arm’s length negotiations by class counsel is presumptively fair

1 and reasonable. *See Weeks v. Kellogg Co.*, Case No. CV 09-08102 (MMM) (RZx),
2 2011 U.S. Dist. LEXIS 155472, at *44 (C.D. Cal. Nov. 23, 2011). Here, the
3 Settlement was reached only after Class Counsel conducted an extensive factual
4 investigation into the Defendant's alleged misconduct and thoroughly researched
5 the law pertinent to the Class's claims and the Defendant's defenses. Thus, Class
6 Counsel had a wealth of information at their disposal before entering into
7 settlement negotiations. Consequently, Class Counsel were able to adequately
8 assess the strengths and weaknesses of Plaintiffs' case and balance the benefits of
9 settlement against the risks of further litigation.

10 Equally important, counsel for the Defendant vigorously defended their
11 client's position and demonstrated their commitment to litigate this Action to its
12 conclusion. Hence, the proposed Settlement represents concessions by both parties
13 after hard-fought negotiations conducted by experienced counsel on both sides who
14 were thoroughly familiar with the factual and legal issues. In these circumstances,
15 there can be no question that the proposed Settlement is not the product of
16 collusion.

17 What is more, the participation of an experienced, neutral mediator in the
18 settlement process further underscores the fact that the proposed Settlement is not
19 the product of collusion. Further, the attorneys' fees to be sought (no more than
20 25% of the Settlement Fund; *see* Settlement Agreement ¶ 79) fall within the range
21 of fees routinely awarded to class counsel in class actions. Consequently, there is
22 no reason to doubt the fairness of the Settlement.

24 **C. Conditional Certification of the Class is Appropriate**

25 In order to proceed with the preliminary approval process, it is necessary for
26 the Court to preliminarily certify a class for purposes of the Settlement. Federal
27 Rule 23 provides that an action may be maintained as a class action if each of the
28 four prerequisites of Rule 23(a) is met and the action qualifies under one of the

1 subdivisions of Rule 23(b). Rule 23(a) provides:

2 One or more members of a class may sue or be sued as representative
3 parties on behalf of all only if (1) the class is so numerous that joinder
4 of all members is impracticable, (2) there are questions of law or fact
5 common to the class, (3) the claims or defenses of the representative
6 parties are typical of the claims or defenses of the class, and (4) the
7 representative parties will fairly and adequately protect the interests of
8 the class.

8 Additionally, Rule 23(b) provides, in relevant part:

9 An action may be maintained as a class action if the prerequisites of
10 subdivision (a) are satisfied and, in addition:

11 (3) the court finds that the questions of law or fact common to
12 members of the class predominate over any questions affecting only
13 individual members, and that a class action is superior to other
14 available methods for the fair and efficient adjudication of the
15 controversy.

16 As set forth below, all of the requirements of Rule 23 are met in this case,
17 justifying preliminary certification of the proposed Class for settlement purposes.

18 **1. The Class is Sufficiently Numerous**

19 “No arbitrary rules regarding the necessary size of classes have been
20 established.” *Berlowitz ex rel. Berlowitz v. Nob Hill Masonic Mgmt.*, No. C-96-
21 01241 MHP, 1996 U.S. Dist. LEXIS 22599, at *6 (N.D. Cal. 1996); *see also*
22 *Seidman v. Am. Mobile Sys.*, 157 F.R.D. 354, 359 (E.D. Pa. 1994) (“There is no
23 magic minimum number necessary to satisfy the Rule 23(a)(1) numerosity
24 requirement.”). Still, numerosity is generally presumed when the potential number
25 of plaintiffs exceeds 40. *Vinh Nguyen v. Radiant Pharmaceuticals Corp.*, 287
26 F.R.D. 563, 569 (C.D. Cal. 2012) (“There is no specific minimum number of
27
28

1 plaintiffs asserted to obtain class certification, but a proposed class of at least forty
2 members presumptively satisfies the numerosity requirement.”)

3 Here, the Class consists of the following: all Intuit customers in the United
4 States who used Intuit’s TurboTax online and utilized the Refund Processing
5 Service from the time period from and including January 12, 2008, through the
6 date of the order granting preliminary approval of the settlement (the “Settlement
7 Class Period”).² Here, the Settlement Class numbers in the millions. Accordingly,
8 the class is sufficiently numerous to satisfy Rule 23(a)(1).

9 **2. Common Questions of Law or Fact Exist**

10 To certify the Class there must be “questions of law or fact common to the
11 class.” Fed. R. Civ. P. 23(a)(2). “Commonality” is thus satisfied upon a showing
12 that “the class members have suffered the same injury” that is “capable of
13 classwide resolution.” *Vandervort v. Balboa Capital Corp.*, 287 F.R.D. 554, 560
14 (C.D. Cal. 2012). In this case, there are questions of law or fact common to the
15 Settlement Class that are capable of classwide resolution. Among others, the
16 common questions in this Action include: (1) Whether the Refund Processing
17 Service Fee is a “finance charge” within the meaning of TILA; (2) whether
18 Defendant disclosed to consumers for which it facilitated RPOs the interest rate
19 and/or finance charge, calculated as required by TILA; (3) whether Defendant’s
20 illegal violations of TILA constitutes an “unlawful” practice in violation of Cal.
21 Bus. & Prof. Code § 17200, *et seq.*; (4) whether Defendant’s failure to provide the
22 TILA disclosures constitutes a “fraudulent” practice in violation of Cal. Bus. &
23 Prof. Code § 17200, *et seq.*; (5) whether (independent of any TILA violations),
24 Defendant’s marketing and sales of the RPOs as a convenient payment option
25

26 _____
27 ² Excluded from the class are all persons who elect to exclude themselves from the
28 class, Intuit, the Court and staff to whom this case is assigned, and any member of
the Court’s or staff’s immediate family.

(when in fact it was a form of credit) constitutes a “fraudulent” practice in violation of Cal. Bus. & Prof. Code § 17200, *et seq.*; (6) whether (independent of any TILA violations), Defendant’s omission regarding the true expenses of the RPOs (by failing to disclose as interest the cost with deferring payment of the tax preparation fees) constitutes a “fraudulent” practice in violation of Cal. Bus. & Prof. Code § 17200, *et seq.*; (7) whether (independent of any TILA violations), Defendant’s description of the RPO as a mere “payment option” (rather than as an extension of credit or by describing the finance charge as a “processing” or “service fee” rather than a finance charge) violates California’s False Advertising Law of Cal. Bus. & Prof Code § 17500, *et seq.*; and (8) whether Defendant’s illegal violations of California’s False Advertising Law constitutes an “unlawful” practice in violation of Cal. Bus. & Prof Code § 17200, *et seq.*

3. Class Representatives’ Claims are Typical of Those of the Class

The “typicality” prerequisite of Rule 23(a)(3) requires that “claims or defenses of the representative parties [be] typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). The purpose of this requirement is “designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals.” *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 531 (3d Cir. 2004); *see also In re Am. Med. Sys.*, 75 F.3d 1069, 1082 (6th Cir. 1996). “Certainly, as in this case, when the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members . . . and if it is based on the same legal theory . . . the typicality requirement is easily satisfied.” *Jerry Enters. v. Allied Bev. Group, L.L.C.*, 178 F.R.D. 437, 442 (D.N.J. 1998) (internal citations and quotations omitted); *see also McAnaney v. Astoria Fin. Corp.*, No. 04-CV-1101, 2006 WL 2689621, at*4 (E.D.N.Y. Sept. 19, 2006) (quoting *DeBoer v. Mellon*

1 *Mortgage. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995) (“The burden of demonstrating
2 typicality is fairly easily met so long as other class members have claims similar to
3 the named plaintiff.”).

4 Here, the proposed Class Representatives (Tasha Smith, Frediereck Smith
5 and Sache Quildon) have claims not only similar, but virtually identical to the
6 Class Members and one another. Indeed, the proposed Class Representatives’
7 claims are typical of the Class Members because they arise from Defendants’
8 alleged common scheme and course of conduct and their allegedly false and
9 misleading statements and omissions. The proposed Class Representatives and
10 members of the Class also share a common injury. Accordingly, the requirement
11 of typicality is satisfied.

12 **4. Class Representatives Will Adequately Protect the Interests**
13 **of the Class**

14 This requirement of Rule 23(a)(4) “serves to uncover conflicts of interest
15 between named parties and the class they seek to represent.” *Amchem Prods. v.*
16 *Windsor*, 521 U.S. 591, 594 (1997). The factors relevant to a determination of
17 adequate representation are “whether [movant] ‘has the ability and incentive to
18 represent the claims of the class vigorously, [whether it] has obtained adequate
19 counsel, and [whether] there is a conflict between [the movant’s] claims and those
20 asserted on behalf of the class.’” *In re Cendant Corp. Litig.*, 264 F.3d 201, 265 (3d
21 Cir. 2001) (quoting *Hassine v. Jeffes*, 846 F.2d 169, 179 (3d Cir. 1988)).

22 Here, the proposed Class Representatives and the Class desire the same
23 outcome of this litigation, namely to retrieve the largest possible monetary
24 recovery from the Defendant as a result of the alleged wrongdoing. Indeed, the
25 proposed Class Representatives’ claims coincide identically with the claims of the
26 putative Class. Because of this, the proposed Class Representatives have
27 vigorously prosecuted this case for the benefit of all members of the Class.
28

1 Moreover, there is no conflict or any antagonism between the proposed Class
2 Representatives and the putative Class. Accordingly, the proposed Class
3 Representatives have the ability and incentive to represent the claims of the Class
4 vigorously.

5 Additionally, Plaintiffs have selected and retained competent Class Counsel.
6 As reflected by each firm's resume (*see* Bates Decl., exhibits 2-5), Class Counsel
7 possess extensive experience prosecuting class actions and have served in either a
8 leadership or a substantive role in class action cases throughout the nation.
9 Undoubtedly, Class Counsel is qualified to represent the Class and will, along with
10 Plaintiffs, vigorously protect the interests of the Class and maximize the recovery
11 for all Class members.

12 **5. The Requirements of Rule 23(b) Are Satisfied**

13 Certification is appropriate under Rule 23(b) when common questions of law
14 or fact predominate over any individual questions and a class action is superior to
15 other available means of adjudication. *Amchem*, 521 U.S. at 591-94. These
16 requirements are satisfied in this case.

17 **a. *Common Questions of Law or Fact Predominate***

18 In analyzing the predominance factor, the Supreme Court has defined this
19 inquiry as establishing “whether proposed classes are sufficiently cohesive to
20 warrant adjudication by representation.” *Amchem*, 521 U.S. at 622. “Class-wide
22 issues predominate if resolution of some of the legal or factual questions that
23 qualify each class member's case as a genuine controversy can be achieved through
24 generalized proof, and if these particular issues are more substantial than the issues
25 subject only to individualized proof.” *Moore v. PaineWebber, Inc.*, 306 F.3d 1247,
26 1252 (2d Cir. 2002). As such, the Supreme Court has noted that this inquiry “is
27 similar to the requirement that ‘claims or defenses’ of the named representatives
28 must be ‘typical of the claims or defenses of the class.’” *Amchem*, 521 U.S. at 623

1 n.18; *see also Evans v. Am. Credit Sys.*, 222 F.R.D. 388, 395 (D. Neb. 2004)
2 (“[W]hen one or more of the central issues in the action are common to the class
3 and can be said to predominate, the action will be considered proper under Rule
4 23(b)(3) even though other important matters will have to be tried separately.”); *In*
5 *re Potash Antitrust Litig.*, 159 F.R.D. 682, 693 (D. Minn. 1995) (stating
6 predominance met “when there exists generalized evidence which proves or
7 disproves an element on a simultaneous, class-wide basis, since such proof
8 obviates the need to examine each class member’s individual position”).

9 The common issues of law and fact noted above in Section IV(C)(2) clearly
10 predominate over any conceivable individual question because Defendant’s alleged
11 misconduct affected all Class Members in the same manner, and each Class
12 Member would need to establish the same facts to demonstrate the alleged
13 violations of TILA, California’s Unfair Competition Law (Cal. Bus. & Prof. Code
14 § 17200), and California’s False Advertising Law (Cal. Bus. & Prof. Code §
15 17500).

16 ***b. A Class Action Is the Superior Method of Adjudicating***
17 ***This Case***

18 The second prong of Rule 23(b) is satisfied by the proposed Settlement. As
19 explained in *Amchem*, “[c]onfronted with a request for settlement-only class
20 certification, a district court need not inquire whether the case, if tried, would
21 present intractable management problems, *see* Fed. Rule Civ. Pro. 23(b)(3)(D), for
22 the proposal is that there be no trial.” *Amchem*, 521 U.S. at 620. Thus, any
23 manageability problems that may have existed in this case are eliminated by the
24 proposed Settlement.
25
26
27
28

1 **D. The Proposed Notice Program Is Adequate**

2 The proposed Preliminary Approval Order will require the Settlement
3 Administrator to provide individual notice of the Settlement to each Class Member
4 via electronic mail to the extent that Intuit has electronic mail addresses for a Class
5 Member. The proposed form of the electronic notice is attached to the Settlement
6 Agreement as Exhibit 3. To the extent that Intuit does not have an electronic mail
7 address for a Class Member or to the extent that the electronic mail “bounces
8 back,” then the Settlement Administrator will deliver notice via U.S. first class
9 mail, postage prepaid, in the form attached to the Settlement Agreement as Exhibit
10 3. In addition, a detailed notice of the Settlement shall be posted on the Settlement
11 Administrator’s website. The proposed form of the electronic notice is attached to
12 the Settlement Agreement as Exhibit 1. The Settlement Administrator shall also
13 cause notice to be published in *USA Today*. The proposed form of the publication
14 notice is attached to the Settlement Agreement as Exhibit 2.

15 These notices shall advise Class Members of the essential terms of the
16 Settlement, and the rights of Settlement Class Members to share in the recovery.
17 The claim form that Settlement Class Members will fill out to share in the
18 Settlement Fund is attached as Exhibit 4 to the Settlement Agreement. The notices
19 shall also advise Settlement Class Members of their rights to request exclusion
20 from the Class or to object to the Settlement, and will provide specifics on the date,
22 time and place of the final approval hearing. Thus, the notices provide the
23 necessary information for Class Members to make an informed decision regarding
24 the proposed Settlement. The notices also contain information regarding counsel’s
25 fee application and the proposed plan for allocating the Settlement proceeds among
26 Class Members.

1 In short, the form and manner of notice proposed here fulfill all of the
2 requirements of Rule 23 and due process, and Plaintiffs request that the Court
3 direct that notice of the proposed Settlement be given to the Class.

4 **V. CONCLUSION**

5 For all the foregoing reasons, Plaintiffs respectfully request that the proposed
6 Settlement be preliminarily approved by the Court, allowing notification to the
7 Class of the terms of the Settlement and of the date of the Final Approval Hearing.

8
9 Dated: May 10, 2013

Respectfully Submitted,

10 **MILSTEIN ADELMAN, LLP**

11
12 By: /s/ Gillian Wade
13 Gillian Wade (Ca. # 229124)
14 gwade@milsteinadelman.com
15 Isaac Miller (Ca. # 266459)
16 imiller@milsteinadelman.com
2800 Donald Douglas Loop North
Santa Monica, California 90405
Tel: 310-396-9600

17 *and*

1 **CARNEY BATES & PULLIAM,**
2 **PLLC**

3 Hank Bates (Ca. # 167688)
4 hbates@cbplaw.com
5 11311 Arcade Drive, Suite 200
6 Little Rock, Arkansas 72212
7 Tel: 501-312-8500

8 *and*

9 **GOLOMB & HONIK, PC**

10 Richard M. Golomb
11 rgolomb@golombhonik.com
12 Ruben Honik
13 rhonik@golombhonik.com
14 Kenneth J. Grunfeld
15 kgrunfeld@golombhonik.com
16 1515 Market Street, Suite 1100
17 Philadelphia, Pennsylvania 19102
18 Tel: 215-985-9177

19 *and*

20 **KU & MUSSMAN, PA**

21 Brian T. Ku
22 brian@kumussman.com
23 M. Ryan Casey
24 ryan@kumussman.com
25 12550 Biscayne Boulevard, Suite 406
26 Miami, Florida 33181
27 Tel: 305-891-1322

28 *Attorneys for Plaintiffs Fredierick
and Tasha Smith and the Class*

19 **CERTIFICATE OF SERVICE**

20 **I HEREBY CERTIFY** that on this **10th day of May, 2013**, I electronically
21 filed the foregoing document with the Clerk of the Court using CM/ECF. I also
22 certify that the foregoing document is being served this day on all counsel of record
23 by transmission of Notices of Electronic Filing generated by CM/ECF.

24 By: /s/ Gillian Wade